CX – 26

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Comments for Docket No. CWA-10-2016-0109 BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Dave Erlanson Sr. Individual

Swan Valley, Idaho

Respondent.

1. 33 U.S.C. Section 1319(g)(2)(B) of the Federal Water Pollution Act (CWA) gives no statutory authority over suction dredge mining in Idaho. 33 U.S.C. Section 1319 has no reference to suction dredge mining in Idaho. Therefore no statutory authority is conveyed by the Congress of the United States to the EPA concerning suction dredge mining in Idaho. The CWA was passed into law and signed by President Nixon in 1972. The permit was issued; https://yosemite.epa.gov/r10/water.nsf/npdes+permits/idsuction-gp, and became effective on May 6, 2013. It doesn't take 41 years to put laws into effect. This is blatant political chicanery and has been treated as such by all observers besides EPA and co-conspirators in the United States Forest Service.
2. EPA proposes to penalize Dave Erlanson Sr. for fictitious, made up violations not in accordance with the CWA or any other statute that anyone knows of. On September 17, 2014 before an Interim Committee hearing, House Resources and Conservation Committee meeting jointly with the Senate Resources and Conservation Committee, EPA failed to make the case for this insidious permit's legitimacy. When asked why the indigenous streambed materials were now considered a "pollutant" under the CWA once worked in Idaho streams by suction dredge miners, Jim Werntz answered, "We are considering it a discharge." The disbelief in the hearing room was altogether palpable and Mr. Jim Werntz left the room in utter disgrace.

In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. Section 1319(g)(1), and 40 C.F.R. Section 22.38(b), EPA has provided the State of Idaho with an opportunity to consult with EPA on this matter. Consider the word of Supreme Court Justice Sandra Day O'Connor as she delivers the opinion in New York v. United States, **(91-543), 488 U.S. 1041 (1992);**

Respondents then pose what appears at first to be a troubling question: how can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

"The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to

citizens the liberties that derive from the diffusion of sovereign power." Coleman v. Thompson, 501 U.S. 722, 759 (1991) (BLACKMUN, J., dissenting). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Gregory v. [505 U.S. 144, 182] Ashcroft, 501 U.S., at 458 . See The Federalist No. 51, p. 323. (C. Rossiter ed. 1961).

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment. In Buckley v. Valeo, 424 U.S. 1, 118 -137 (1976), for instance, the Court held that Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law. See National League of Cities v. Usery, 426 U.S., at 842 , n. 12. In INS v. Chadha, 462 U.S. 919, 944 -959 (1983), we held that the legislative veto violated the constitutional requirement that legislation be presented to the President, despite Presidents' approval of hundreds of statutes containing a legislative veto provision. See id., at 944-945. The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of this case raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."

What we see here is an unconstitutional violation to the individual rights of Dave Erlanson Sr. and the acquiescence of the State of Idaho is in no way an acceptable leap of logic to establish statutory authority where none exists. In contrast, according to the structure of the CWA and the absolute fact that the EPA has awarded $622 million to the Idaho Dept. of Environmental Quality over the course of the last 16 years, and an untold amount of monies to the Attorney General's Office in Idaho, this grant money amounts to a bribe. The entire CWA is unconstitutional on its face, but lawyers have been so busy making money off of the litigation that it incurs to consider its challenge. Idaho citizens are not so naïve.

3. The CWA, 33 U.S.C. Section 1251, had lofty and honorable goals. 33 U.S.C. Section 1251(b), outlines the rights of states to control pollution under Section 1342 Nation Pollution Discharge Elimination Permits (NPDES). Suction dredge mining in Idaho adds nothing into the water that was not already there in the first place. What is contained in the outflow of the sluice box portion of the suction dredge is considered "incidental fallback." To illustrate this point originally in *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399, 1404 (D.C.Cir.1998). The court explained that, *"[b]ecause incidental fallback represents a net withdrawal, not an addition, of material**, it cannot be a discharge**"* *and questioned "how there can be an addition of dredged material when there is no addition of material."* Emphasis added. Furthermore the court stated; "**The Court concludes that neither § 301 nor § 404 covers incidental fallback."** By Extension Section 301 excludes by any clear reading of statute Sections 1342 and 1344. Section 1342 is NPDES. There is a national injunction against the EPA from enforcing what was known as the Tulloch Rule. "**ORDERED, that the so-called Tulloch rule is declared invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency."** Hence this Complaint against Dave Erlanson Sr. is in violation of a court order, due to the fact that suction dredge mining represents "incidental fallback."

4. In Frobel v. Meyer, 13 F. Supp.2d 843 the court ruled: "Redepositing of indigenous sediment caused by state agency's removal of dam did not result in any "discharge of dredged material" that would require permit from Army Corps of Engineers under Clean Water Act (CWA) and either possible version of implementing regulations, even if manner in which dam was removed created a "scouring action" that disturbed sediment and funneled it downstream. Federal Water Pollution Control Act, § 404(a), as amended, 33 U.S.C.A. § 1344(a); 33 C.F.R. § 323.2(d)."

5. Turbidity is not a pollutant. It is incredibly easy to see what the EPA is trying to do here. In the appeal to the Nat'l Mining Ass'n decision the Court once again rejected the agencies disingenuous arguments and Judge Silberman Concurred. Here is what is known as the Silberman Standard as found in **Nos. 97-5099, 97-5112. Decided June 19, 1998.** The Silberman Standard;

SILBERMAN, Circuit Judge, concurring:

I join the opinion of the court and write separately only to make explicit what I think implicit in our opinion. We hold that the Corps's interpretation of the phrase "addition of any pollutant to navigable waters" to cover incidental fallback is "unreasonable," which is the formulation we use when we have first determined under Chevron that neither the statutory language nor legislative history reveals a precise intent with respect to the issue presented--in other words, we are at the second step of the now-familiar Chevron Step I and Step II analysis. See, e.g., Whitecliff, Inc. v. Shalala, 20 F.3d 488 (D.C.Cir.1994); Fedway Associates, Inc. v. United States Treasury, 976 F.2d 1416 (D.C.Cir.1992); Abbott Labs. v. Young, 920 F.2d 984 (D.C.Cir.1990); Associated Gas Distribs. v. FERC, 899 F.2d 1250 (D.C.Cir.1990). As our opinion's discussion of prior cases indicates, the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an "addition." Or if it were held for some time and then dropped back in the same spot, it might also constitute an "addition." But the structure of the relevant statutes indicates that it is unreasonable to call incidental fallback an addition. To do so perforce converts all dredging--which is regulated under the Rivers and Harbors Act-- into discharge of dredged material which is regulated under the Clean Water Act.

Moreover, that Congress had in mind either a temporal or geographic separation between excavation and disposal is suggested by its requirement that dredged material be discharged at "specified disposal sites," 33 U.S.C. § 1344 (1994), a term which simply does not fit incidental fallback.

The Corps attempts to avoid these difficulties by asserting that rock and sand are magically transformed into pollutants once dredged, so all dredging necessarily results in an addition of pollutants to navigable waters. But rock and sand only become pollutants, according to the statute, once they are "discharged into water." 33 U.S.C. § 1362(6) (1994). The Corps's approach thus just leads right back to the definition of discharge.

6. Complaint item II. 2.2. references the Section 301 and Complaint item II. 2.4 references and I quote, "Section 502(6) of the CWA. 33 U.S.C. Section 1362(6) defines 'pollutant' to include, *inter alia,* dredged spoil, rock, and sand." As can be observed above this amounts to "magic." This level of transparency should allow any Administrative Law Judge to see right through this travesty and rule in favor of the CWA to dismiss this Complaint against Dave Erlanson Sr. This entire complaint is statutorily incorrect.
7. This permit that has been promulgated by the EPA has several faults. The most glaring fault and the most glaring abuse of discretion by the EPA lies in the absolute fact that the permit does not comport to the Administrative Procedures Act. The first rule in rule-making is that the rule be science based. Here is the sum total of science that the EPA used to promulgate this offensive rule; EPA to US Fish and Wildlife Services and National Marine Fisheries Biologists (the services), "Will you give us a Not Likely to Adversely Affect (NLAA) determination if we prohibit suction dredge mining in critical habitat for listed aquatic species?" "Well, hey, sure we can do that for you!" And there you have it. The goal was the stated purpose of the Endangered Species Act (ESA), "…And in any agency action…" Making suction dredge mining in Idaho into an agency action places it squarely in the auspices of the ESA. This was the goal and no other. This has been the goal of the federal agencies and it is disappointingly obvious that they don't have any compunction to have a conscience about what is right or wrong, legal or illegal. The EPA has decided to march on as if there remains no accountability to anyone or anything. It leaves no stretch of the imagination to realize that the EPA employees are acting at the command of the highest levels of the executive branch. This is corruption perpetrated on the United States and secured by the threats to employee paychecks and pensions. There is no doubt in this commenter's mind that the federal reserve system of printing press printed dollars funding massive federal deficits is to blame for this transgression. Justice is said to be blind, but this anarchy is monumentally unprecedented in scope and destructive on a national scale.
8. Dave Erlanson Sr. was on his federal mining claim. No one has the right to materially interfere with the prospecting and removal of mineral deposits contained thereon. 30 U.S.C. Section 22. While environmental concerns are noble in intention, the environmental protection has been eclipsed by the greed for power and money. The rights of the individual must be protected first and foremost or the rule of law is made of none effect. Our system of government cannot withstand an erosion of trust that comes from a lamentable straying from ordinary principles of morality and decency. EPA must adhere to lawful procedures.
9. It has been alleged that Dave Erlanson Sr. was observed "actively dredging with the plume from the upstream dredge mixing the plume of the downstream dredge." Is Clint Hughes an inspector with the EPA? Is Clint Hughes certified to make a determination that a violation of the CWA was indeed what he was observing? Did Clint Hughes or any other EPA inspector engage Dave Erlanson Sr. in advance of the complaint being leveled against him to explain the nature of the infraction that is alleged to have occurred? Certainly a proper procedure must be contained in EPA guidelines and there is no reasonable way that one can assume that the process that is outlined in the complaint comports to due process. First of all, no inspector is actively seeking a remedy with an on the ground follow up with Dave Erlanson Sr. This complaint delivered in the

U.S. Postal System is cowardly to say the least and leaves one to wonder if the legitimacy of the EPA is fading.

10. What human health and safety has been compromised by the actions of Dave Erlanson Sr.?
There is absolutely no benefit to this complaint. Nothing of environmental concern is being accomplished here. This is just an inflammation of relations between a rogue agency and the general public. I would remind the Administrative Law Judge that the lack of science being normalized within EPA was the product of the work of a now convicted felon (John Beale). Former Administrator Lisa Jackson was forced to resign because of an improper email address (Richard Windsor?) that was specifically designed to obfuscate and circumvent the Freedom of Information Act (FOIA) request requirements.
Thank you for allowing me to comment on this important issue,
Sincerely,
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(b) (6)

Rocky Mountain West
Home of the Free and the Brave

GREAT FALLS 2/11/16

Dear Ms Lund! Re: Dave Erlenson lawsuit

The Erlenson case has zero basis in law, is simply harassment, and individuals responsible should be held accountable.

Government employees should be working for the people, not bullying them. This case is abuse, pure & simple.

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